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February 6, 2002

Donald S. Clark
Secretary
Federal Trade Commission
Room 159-H
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Public Comment on Remedial Use of Disgorgement

Dear Mr. Clark:

I would like to submit for the record, without further comment, views I was privileged to express as a representative of the U.S. Department of Justice in 1988. The concerns expressed at the time were limited to FTC pursuit of consumer redress in cases that might constitute violations of Section One of the Sherman Act, rather than FTC pursuit of disgorgement in cases brought under the Clayton Act or the Hart-Scott-Rodino Antitrust Improvements Act. Even so, the views are responsive to question 4 of the notice and request for comments, which asks whether the potential for criminal prosecution by the Antitrust Division or the potential for private damages litigation should affect the Commission's decision to seek disgorgement in the class of cases to which those comments related. To the extent that those concerns are still valid, I respectfully offer them for the Commission's consideration.

Thank you.

Respectfully submitted,

Kenneth G. Starling

Kenneth G. Starling

KGS/ld
Enclosure

CRIMINAL ANTITRUST ENFORCEMENT

KENNETH G. STARLING*

First, I need to respond to some of the things that Commissioner Strenio suggested earlier,[1] to sound a note of caution about the use of 13(b) authority in the price-fixing area at the Federal Trade Commission. It is not just that I want to jump into his topic, but it does relate to legislation on which the Division is going to testify next week—this Section of the ABA is also going to testify on that legislation next week—and it is also obviously related to what I have to say about criminal enforcement.

I think that there is a serious possibility that tension might arise between the Federal Trade Commission and the Antitrust Division as the FTC begins to look for opportunities to use the consumer redress authority. Certainly, it might arise as soon as an investigation under consideration by the Federal Trade Commission for these purposes shows its criminal nature. The question will come up whether to refer it to the Antitrust Divison for criminal prosecution then, or to take a little bit of discovery and refer it later.

I think that there is a serious risk to criminal prosecution if the Federal Trade Commission pursues civil discovery in a criminal matter too long before turning it over to the Justice Department. If the search for good redress opportunities would cause the FTC to retain a price-fixing or cartel-behavior case any longer than is helpful to criminal prosecution, then we would be very concerned about that. Even if the referral to the Department went as it should, I can still see some disagreements arising between the FTC and the Justice Department with respect to the handling of witnesses and plea bargains in such matters. There is no question that the Justice Department has a comparative advantage in investigation of cartel activity, with the use of the grand jury as our investigative tool. We believe strongly that any potential criminal conduct should be handled by the Division at the earliest opportunity.

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* Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice.

[1] *See* Strenio, *Why Thirteen Should Be a Lucky Number for Victims of Price-Fixing*, 57 ANTITRUST L.J. 149 (1988).

Beyond this problem of potential interference with criminal enforcement, the Division has some problems with the idea of federal parens patriae authority, which would be conferred by pending legislation. We believe that FTC consumer redress actions would probably run into the same kinds of difficulties that we foresee in the parens patriae area.

In the follow-on civil damages area, we don't think that the Justice Department has any comparative advantage over private plaintiffs' antitrust lawyers or the state attorneys general, and we don't think that the Federal Trade Commission has any comparative advantage over them either. We foresee a morass of practical procedural problems with federal government class action-type lawsuits, in terms of proving and measuring damages for different classes of consumers and products, providing opt-outs for the state attorneys general whose own parens patriae suits might be preempted by such federal parens class action-style, or redress, suits. There would be interesting questions of damage allocation and measurement if defendants could be hit for actual damages by the federal government redress actions and also treble damages in state or private suits. We think that the courts would face increased difficulty avoiding duplicative recovery.

It is really doubtful that the federal government has any advantage over private plaintiffs or state attorneys general in managing class action suits. In addition, our economists have suggested to me that it is very hard to tell whether there are unrecovered overcharges available from our completed criminal cases, but they seriously doubt it. This would suggest that if there were unrecovered overcharges in such matters, private plaintiffs or state attorneys general would have pursued them already, or will pursue them in the future, if there is sufficient incentive. If the FTC would seek redress in cases where the incentive for private recovery is low, then it might end up spending more on the recovery effort than it ends up recovering, which wouldn't necessarily be the best use of federal enforcement funds.

So, it may be more efficient, both as a way of deterring would-be antitrust violators and as a means of disgorging the ill-gotten gains from antitrust violators, to go after heavy criminal fines, which brings me to my main topic, criminal enforcement.

Criminal prosecution of cartel behavior is the top priority of the Antitrust Division. To give you a quick picture of the level of criminal enforcement activity at the Antitrust Division today, let me tell you that in the last fiscal year the Criminal Division filed 92 criminal cases against 119 corporations and 116 individuals. In that year, we obtained fines of

18 million dollars and jail sentences totaling about 2000 days, which were actually below the average over the entire Reagan Administration.

The Division has brought cases in a broad range of industries, namely: highway construction, electrical contracting, dredging, well construction, utility construction, gasoline, bread, steel pipe, chemicals, waste hauling, movie exhibition, soft drinks, and auctions. The charges we brought included price-fixing, bid-rigging, and customer and territory allocation; also, fraud against the government, wire fraud, mail fraud, and false statements to the government; we also brought perjury and obstruction of justice charges. Fraud against the federal government in the procurement area is an important focus within this program; we brought 15 of those cases in the last fiscal year. This high level of criminal enforcement activity is going to continue because there are now 145 grand juries working, and they are going to produce some criminal cases.

There is no doubt that price-fixing, bid-rigging, and other forms of cartel behavior are serious crimes, but there was an earlier tendency to regard antitrust violations as technical violations. The Division is doing everything it can to convince the public, the courts, and the United States Sentencing Commission that antitrust violations are major offenses—first-class felonies.

Now, let me go back to sentencing because that is an important part of our criminal enforcement program. We believe—and we agree with Andy Strenio—that deterrence is the primary purpose of criminal antitrust enforcement, and the Division is convinced that effective deterrence requires the use of very substantial penalties both in fines and imprisonment. The Antitrust Division has for some time now strongly advocated significant jail terms and very large fines for convicted antitrust felons.

Fortunately, the United States Sentencing Commission heeded the recommendations of the Division and others and made a firm commitment to mandatory incarceration and heavier fines. Now is not the time for me to review in detail the operation of the Sentencing Guidelines, but I would like to note that the offense level for price-fixing is high and it goes up with the amount of commerce involved. So, the resulting formula, for example, would suggest, for bid-rigging involving one to four million dollars of commerce, a jail sentence of six to twelve months. For the offense levels and amounts of commerce that we are likely to see in our cases, the Guidelines call for confinement, probably in prison, but maybe in-community confinement. Right now, sometimes we have people given house arrest. That's not the kind of thing we are after. The commentary in the Sentencing Guidelines, as Commissioner Strenio noted,

expresses the intention of the Sentencing Commission that community confinement will not be used to avoid imprisonment of antitrust offenders.

Not only will the jail terms increase under the Guidelines, but so will the fine levels. The range recommended for fines for antitrust violations is 4 to 10 percent of the volume of commerce involved for individuals and 20 to 50 percent of the amount of commerce involved for organizations. Unfortunately, the statutory cap of one million dollars would still apply to fines.

As a means of disgorging proceeds of price-fixing, I suggest that massive corporate fines of, say, 50 percent of the commerce involved, unrestricted by the one million dollar cap, may be the most effective method. The Canadian antitrust statute, for example, has a five million dollar cap on fines. Ours is just too low.

While incarceration may be the most important and effective deterrent to a would-be antitrust offender, there is a broad consensus that massive corporate fines would be the next best way to deter criminal antitrust behavior. Therefore, while the Division anticipates being pleased with the effects of the Sentencing Guidelines once they kick in, it may be appropriate to consider some sort of legislative adjustment to the maximum fines. It just depends on how the Guidelines work, but we anticipate that at some point in the near future it will be appropriate to suggest lifting the statutory cap on fines.

The final area of our criminal enforcement program I will mention is how we decide what charges to bring. We have passed the point in antitrust when antitrust violations warranted indictment on only one count no matter how many conspiracies a defendant may have been involved in and warranted charging only the Sherman Act violations when there was collateral criminal conduct involved. Today, the Antitrust Division, as you probably know, will charge collateral counts supported by the evidence and will vigorously pursue multiple indictments for multiple conspiracies by the same defendant. Those collateral charges include mail fraud, false statements, false claims, and fraud against the government, as I mentioned.

In this regard, let me call to your attention an appeal that we have recently taken from dismissal of a count of conspiracy to defraud the government. In *United States v. Ashley Transfer*, the defendant moving and storage firms were indicted for conspiring to fix prices charged to the United States for storage services at three military installations and for conspiring to defraud the United States in violation of 18 U.S.C.

Section 371. The district court dismissed the Section 371 count as multiplicitous, even though it found that the charge was supported by substantial evidence. In our appeal to the Fourth Circuit, we argue that the conspiracies defined by Section 371 and by the Sherman Act are separate offenses. There is no doubt that Congress can impose multiple punishment for a single act that violates more than one statute. This is just an illustration that where the Division finds collateral offenses alongside Sherman Act violations, it will charge defendants with them.

As you can see from this brief overview, the Antitrust Division is a vigorous and, we think, efficient criminal prosecution unit. Your clients do *not* want to become criminal defendants.